LIM KOK LIAM & SONS SDN. BHD.

v.

LAU CHOON WAN (LEONG YOK CHIN INTERVENER)

HIGH COURT MALAYA, SHAH ALAM
TUAN ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: 22-98-95]
13 AUGUST 1996

CIVIL PROCEDURE: *Intervener proceedings - Writ of possession - Application to intervene to set aside writ - Whether an exercise in futility when no application made to set aside the order granting leave for issue of writ thereof.*

CIVIL PROCEDURE: *Writ of possession - Leave for issue of - Right of occupier of premises - Whether due notice given to occupier - Whether occupier entitled to right to be heard before leave granted - Occupier given notice of proceedings for recovery of possesion but not served with the application for leave to issue writ of possession - Effect - Rules of the High Court, 1980 O. 45 r. 3.*

CIVIL PROCEDURE: *Stay of execution - Application to stay execution of writ of possession - Principles - Special circumstances - Whether to be specifically demonstrated - Whether facts thereof to be set out in affidavit - Stay order - Whether could be made on terms and not simpliciter - Alternatives to a stay simpliciter - Whether to be set out in affidavit - Rules of the Court of Appeal, 1994 r. 13*

This was an application by Leong Yok Chin (Leong), the Intervener, to set aside a writ of possession obtained by the plaintiff and, upon the dismissal of the same by the learned Judge, for stay of execution of the writ pending his appeal to the Court of Appeal.

The facts were that on 11 July 1995, the plaintiff, the owner of the premises in question, had obtained an order for vacant possession thereof against the defendant. The plaintiff sought leave for the issue of a writ of possession and leave was accordingly granted on 6 December 1995. The application, being as it were an application for leave, proceeded on and was dealt with vide file CS 22-98-95. Thereafter, following proceedings therefor, a writ of possession (the first WP) was issued in respect of the premises. However, following normal practice, this writ of possession was issued not under file CS 22-98-95 but under a separate file, namely file "Pelaksanaan No. A/E 37-74-95".

On 25 January 1996, Leong, the occupier of the premises, was granted an order to become an Intervener on file Pelaksanaan No. A/E 37-74-95. In the meanwhile, the plaintiff had abandoned the first WP due to irregularities, and on 23 April 1996 applied for a new writ of possession (the second WP) by

way of a fresh *ex parte* summons in chambers. Exhibited in this summons was a certain letter dated 14 March 1996 to Leong's solicitors, and attached to the letter was the order of 11 July 1995 as amended as well as a copy of the amending order. The supporting affidavit to the summons affirmed that the latter documents had been served on Leong's solicitors, Messrs. K Kulasekar & Associate. On 7 May 1996 leave for the second WP was granted, and the second WP was issued on 23 May 1996.

On 4 June 1996, Leong applied to intervene on file CS 22-98-95. In effect the application was for the setting aside of the second WP on the grounds, *inter alia*, that there was non-observance of the provisions of the Rules of High Court 1980, and that the application for leave to issue the second WP was not served on him or his solicitors. However, when the application was heard on 25 June 1996, Leong withdrew the application contending that the fact that he had been granted leave to intervene in file Pelaksanaan No. A/E 37-74-95 had already made him an Intervener in file CS 22-98-95. This contention was dismissed by the learned Judge who consequently rejected the application. Leong appealed against the ruling, and on 23 July 1996, filed an application for a stay of the second WP, which was scheduled for execution on 26 July 1996. Before the learned Judge Leong *inter alia* argued that his restaurant business at the premises would be adversely affected by the execution and there was no likelihood of remedy if stay was not granted and he succeeds in the appeal.

Held:

[1] Order 45 r. 3(3) Rules of the High Court, 1980 gives occupiers of all or part of the premises the right to be heard before leave for the issue of a writ of possession is granted. It follows that where he has not been given due notice so as to be able to exercise such right, he may apply even after leave has been granted, to set aside the leave. This is the case even if he has not been made a party in the original action upon which the execution proceeding is based. The proper procedure for such person to enter and be heard is to apply to be an Intervener and until the application is granted, he is the "Proposed Intervener".

[2] In the instant case, the first writ of possession was issued under the file "Pelaksanaan No A/E 37-74-95" and Leong had been granted an order to become an Intervener thereon. Yet during the hearing on 25 June 1996, the application to intervene on file CS 22-98-95 was withdrawn. Clearly, upon it being withdrawn, Leong no longer has standing to appear and be heard in this matter.

[3] The argument that Leong has become an Intervener in CS 22-98-95 by virtue of the grant of leave for him to intervene in the file Pelaksanaan No A/E 37-74-95 in respect of the first WP is unsustainable. Such argument cannot be accepted because it would cause havoc in the conduct

of proceedings as parties could emerge to be heard on the grounds that they have been entered as Intervener in another case between the parties or in respect of the same matter. The Proposed Intervener must make application and the fact that he has been allowed to intervene in a case involving the same matter or between the same parties would be extremely pursuasive for his application. But the fact remains that he must apply.

[4] This application is to set aside the writ of possession dated 23 May 1996. There is no application to set aside the **leave** for the issue of a writ of possession granted on 7 May 1996. The application to set aside the writ of possession, upon the grounds directed for objection to the grant of leave to issue the writ **but without an application to set aside the grant of the leave itself**, is an exercise in futility. The order applied for, being an exercise in futility, ought to be rejected.

[5] The mere fact that Leong's name is not put on the documents as a party or Intervener, or that the application for leave to issue writ of possession is not served upon him is immaterial so long as notice was given of proceedings for recovery of possession. Leong was having the professional assistance of solicitors and having applied to intervene in the earlier writ of possession proceedings in respect of the same premises, he cannot now say that he had not had sufficient notice to apply to the Court for any relief to which he may be entitled and has been prejudiced thereby. And after notice has been given, there is no reason why the plaintiff may not proceed *ex parte* if no application is filed by any occupier.

[6] The application to set aside the writ of possession ought to be rejected as Leong has no standing in the matter, having withdrawn the application to intervene. Even if he has standing, the application, being for a futile order, ought to be rejected. And even accepting that he has properly applied to intervene and is applying for a correct order, the application has not been made in good time after having received notice of proceedings since January 1996 of judgment obtained in July 1995. These apart, the application is also without merit.

[7] In determining whether or not there was "special circumstances" such as to justify the grant of stay, one of the factors that calls for consideration is whether or not by making an order of stay it would make the appeal, if successful, nugatory, in that it would deprive an appellant of the results of the appeal. The fact that an appeal would be rendered nugatory if successful, by itself, may become a sufficient reason to grant stay. These aside, merits of the appeal, delay and cause of delay, whether the order was pursuant to a summary judgment and not a full trial, were relevant considerations in the exercise of the discretion by the Court.

[8] An application for stay must not only claim special circumstances as such, but must highlight facts which showed those circumstances, unless the circumstances and factors relied upon are apparent from the record. Also, as a stay order need not be made simpliciter, and may be made on terms, alternatives to a stay order must be prayed for.

[9] An applicant for a stay, thus, must pray for the specific order required, with alternatives to a stay *simpliciter* if applicable. In addition, in his supporting affidavit he must (i) aver that there are special or exceptional circumstances (ii) aver that the particular factors or circumstances relied on as special or exceptional circumstances (iii) aver and prove, with exhibits where necessary, the facts relied on as supporting the factors or circumstances at (ii) above, if these facts are not clear or apparent in the record. All these were not done in the instant application. The facts also showed that having stated that he needed one month to find alternative premises if he were to move out, there was nothing in the circumstances of this case that could be said to become nugatory if the applicant is given that time.

[Application to set aside writ of possession and for stay of execution dismissed. Date of execution of writ postponed to 25 August 1996]

Cases referred to:

Fleet Mortgage & Investment Co. Ltd. v. Lower Maisonette 46 Eaton Place Ltd. & Anor. [1972] 2 All ER 737 ***(dist)***

Serangoon Garden Estate Ltd. v. Ang Keng [1953] MLJ 116 ***(refd)***

Leong Poh Shee v. Ng Kat Cheong [1966] 1 MLJ 86 ***(refd)***

Government of Malaysia v. Datuk Haji Kadir Mohamaf Mastan and another application [1993] 3 MLJ 514 ***(foll)***

Yun Hing (Sabah) Sdn. Bhd. v. Sandakan Plywood & Veneers Co. Sdn. Bhd. [1995] 1 MLJ 339 HC ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn. Bhd. [1995] 2 CLJ 701; [1995] 2 MLJ 105; [1995] 2 AMR 1484 ***(refd)***

Government of Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161; [1995] 2 MLJ 119 FC ***(refd)***

Wu Shu Shen v. Raja Zainal Abidin bin Raja Hussin [1995] 3 MLJ 224 HC ***(refd)***

See Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors. [1995] 3 MLJ 598 CA ***(foll)***

All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd. [1996] 4 MLJ 533 ***(refd)***

Mohamad Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 FC ***(foll)***

Chong Woo Yit v. Government of Malaysia [1989] 1 MLJ 473 ***(cit)***

Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors. [1987] 2 MLJ 377 ***(cit)***

Goh Keng How, deceased v. Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224 ***(refd)***

Re Middle Harbour Investments Ltd. (In Liquidation) (Court of Appeal - unreported 15 December 1976) ***(refd)***

Alexander v. Cambridge Credit Corp Ltd. [1985] 10 ACLR 42 CA (NSW) ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 13
Rules of the High Court 1980, O. 45 r. 3(3)

For the plaintiff – CK Yeoh; M/s. Othman Hashim & Co.
For the respondent – K Kulasekar; M/s. K Kulasekar & Assoc.

JUDGMENT

Abdul Wahab Patail J:

The Application to set aside Writ of Possession.

The Background.

The plaintiff had commenced action by way of a writ of summons filed on 28 March 1995 against the defendant, seeking a declaration that the defendant is an unlawful tenant, an order for vacant possession, special damages, interest on special damages, costs and other orders as the Court thinks fit. An order was obtained on 11 July 1995. This led to an *ex parte* summons relying on service of a notice and copy of the order to the defendant seeking leave for the issue of a writ of possession. This was granted on 6 December 1995.

The subsequent writ of possession (the first WP) proceedings then proceeded on the file "Pelaksanaan No A/E 37-74-95". In the course of that proceeding Leong Yok Chin applied to intervene as the occupier of the premises. The application to intervene was granted on 25 January 1996. For the reasons given below he is referred to by name, not as intervener, to avoid confusion.

Due to irregularities in the first WP, that writ was abandoned. The plaintiff applied through a fresh *ex parte* summons in chambers filed on 23 April 1996 (the 23 April 1996 application) based on the service of a new notice dated 14 March 1996 to Messrs Harbajan Singh Sidhu & Co. as solicitors for the defendant for a new writ of possession (the second WP). Exhibited in the 23 April 1996 Summons-in-Chambers was a letter dated 14 March 1996 to K Kulasekar & Associate as solicitors for Leong Yok Chin and attaching thereto a copy of the order of 11 July 1995 as amended as well as a copy of the amending order. Para 9 of the supporting affidavit to the *ex parte* summons in chambers states as follows:

> 9. Pada 19 Mac 1996, saya juga telah mengarahkan kerani saya untuk menghantarkan sepucuk surat bertarikh 14 Mac 1996 bersama dengan Perintah Terpinda dan Penghakiman tersebut kepada peguamcara pencelah iaitu Tetuan K Kulasekar & Associate secara diri sendiri. Sesalinan surat tersebut yang telah diakui terima dilampirkan di sini dan ditanda sebagai eksibit "YCK-2".

The 23 April 1996 *ex parte* application was heard and leave was granted on 7 May 1996 for the issue of a writ of possession (the second WP).

The Application.

This application by way of summons in chambers issued on the 4 June 1996 by Leong Yok Chin contains five prayers. Of these three were withdrawn during hearing leaving the following for consideration:

(iii) Writ pemilikan bertarikh 23 Mei 1996 terhadap premis No 63, Jalan 20/7, Paramount Garden, 47300 Petaling Jaya, Selangor DE dibatalkan.

(iv) Kos permohonan ini ditanggung oleh plaintif.

Leong Yok Chin's grounds as summarised in his affidavit are as follows:

9. Saya sesungguhnya percaya dan dinasihatkan bahawa permohonan plaintif untuk mendapatkan kebenaran bagi mengeluarkan writ kedua tidak diserahkan kepada saya ataupun peguamcara saya dan kegagalan ini memprejudiskan saya.

10. Saya sesungguhnya percaya dan dinasihatkan bahawa peruntukan-peruntukan Kaedah-kaedah Mahkamah Tinggi 1980 tidak dipatuhi sebelum plaintif memohon mengeluarkan writ kedua.

11. Saya sesungguhnya percaya dan dinasihatkan bahawa writ kedua tersebut adalah defektif dan patut dibatalkan.

The Issues

It is appropriate at this point to refer to the relevant order. Order 45 r. 3 of the Rules of the High Court 1980 is as follows:

3.(1) Subject to the provisions of these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means, that is to say:

(a) writ of possession.

(b) in a case in which r. 5 applies, an order of committal.

(2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without the leave of the Court except where the judgment or order was given or made in a charge action to which O 83 applies.

(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

(4) A writ of possession may include provision for enforcing the payment of any money adjudicated or ordered to be paid by the judgment or order which is to be enforced by the writ.

Order 45 r. 3(3), therefore, gives occupiers of all or part of the premises the right to be heard before leave for the issue of a writ of possession is granted. It follows that where he has not been given due notice so as to be able to exercise such right, he may apply even after leave has been granted, to set aside the leave. This is the case even if he has not been made a party in the original action upon which the execution proceeding is based. The proper procedure for such person to enter and be heard is to apply to be an intervener. Until the application is granted, he is the "Proposed Intervener'.

The application to intervene made on 4 June 1996 was made on this file CS 22-98-95. This is the file where leave for the issue of a writ of possession is applied for. The writ of possession is normally issued on another file under series A/E. Thus the first writ of possession issued was under file "Pelaksanaan No A/E 37-74-95". He had been granted an order to become an intervener thereon. Yet; during the hearing on 25 June 1996, the application to intervene on file CS 22-98-95 is withdrawn. Upon it being withdrawn, Leong Yok Chin no longer has standing to appear and be heard in this matter. His application cannot be considered and would therefore fail. Having been granted leave to intervene in the file Pelaksanaan No A/E 37-74-95 in respect of the First WP, it is argued that by virtue of that order he has become an Intervener in CS 22-98-95. This cannot be so, since if the argument is accepted, it would cause havoc in the conduct of proceedings as parties emerge to be heard on the grounds they have been entered as intervener in another case between the parties or in respect of the same matter. The proposed intervener must make application and the fact that he has been allowed to intervene in a case involving the same matter or between the same parties would be extremely persuasive for his application. But the fact remains he must apply.

Further, this application is to set aside the writ of possession dated 23 May 1996. There is no application to set aside the **leave** for the issue of a writ of possession granted on 7 May 1996. The application to set aside the writ of possession, upon the grounds directed for objection to the grant of leave to issue the writ **but without an application to set aside the grant of the leave itself**, is an exercise in futility. In drafting the prayers or orders applied for, it is the duty of the solicitor to address his mind precisely to the orders required to achieve his clients' objectives. As the solicitor for Leong Yok Chin that onus remains upon him at-all times. The opposing party has no obligation to suggest alternatives. The Court must maintain its distance from the fray by as far as possible, and except for minor amendments, not entering into the arena by inserting by amendment its own views of what orders the party should have applied for. The order applied for, being an exercise in futility is on this ground also rejected.

Even assuming firstly that Leong Yok Chin is properly entered as an intervener, and secondly, assuming also that he is properly applying for an order to set aside the leave for the issue of a writ of execution, we must next consider

the basis for setting aside the leave. Order 45 r. 3(3) sets out the conditions before leave to issue a writ of possession is granted. The question is whether Leong Yok Chin received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled. Granted that the copies of orders served upon Leong Yok Chin's solicitors are orders against the defendant without any mention of Leong Yok Chin, he having the professional assistance of solicitors and having applied to intervene in earlier writ of possession proceedings in respect of the same premises and between the same plaintiff and defendant, cannot say he had not had sufficient notice to apply to the Court for any relief to which he may be entitled and has been prejudiced thereby. He had not taken any action until 4 June 1996. Since at least 25 January 1996 when leave was granted to intervene in A/E 37-74-95 he had become aware of proceedings by the plaintiff to recover the premises. Further notice was given in March.

What can be derived from submissions is that the plaintiff had sued the defendant for vacant possession and obtained judgment. There is no relationship between the plaintiff and Leong Yok Chin, who presumably derives his rights from the defendant. Merely that his name is not put on the documents as a party or intervener, or that the application for leave for issue of the writ of possession is not served upon him is immaterial so long as a notice has been given of proceedings for recovery of possession. After notice had been given, there is no reason that the plaintiff may not proceed *ex parte* if no application is filed by any occupier. This case is easily distinguishable from *Fleet Mortgage & Investment Co. Ltd. v. Lower Maisonette 46 Eaton Place Ltd. & Anor.* [1972] 2 All ER 737 where an *ex parte* application with no notice had been given.

In the circumstances, having withdrawn application to intervene has no standing in this matter, the application is rejected. Even accepting that he has standing, the application being for a futile order, it is also rejected. Finally, even accepting he has properly applied to intervene and is applying for a correct order, the application has not been made in good time after having received notice of the proceedings since January 1996 of judgment obtained in July 1995, there is no merit in the application and is hereby rejected.

Costs is awarded to the plaintiff.

B. The Application for Stay of Execution

Background

This is an application by way of a summons in chambers (Encl 28) by one Leong Yok Chin for an order that a writ of possession scheduled for execution on 26 July 1996 be stayed until his appeal to the Court of Appeal is disposed of.

Unhappy with the result above he has directed Counsel to appeal to the Court of Appeal, and filed this application in Encl 29 on 23 July 1996 supported by the affidavit of Leong Yok Chin as Encl 28 affirmed on the same day, for a stay of execution. The notice of appeal itself, according to the solicitors was filed on 24 July 1996.

Locus Standi

This application for a stay of execution is made by Leong Yok Chin. It is heard purely as that of a person dissatisfied with the earlier judgment of this Court. The question of locus therefore does not arise in this part of the proceedings. I therefore set aside objections made on the ground of *locus standi* in this application.

Stay of Execution: The Principles

This application is best dealt with by first considering the applicable principles with regard to a stay of execution. The usual formulation of the approach towards the grant of a stay of execution is that there must be special circumstances. The 1953 case of *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116 by Browne J is often cited as the authority for the proposition in this country. In the efforts to determine what is meant by the term "special circumstances", it is sometimes referred to interchangeably as exceptional circumstances. In *Leong Poh Shee v. Ng Kat Cheong* [1966] 1 MLJ 86 Raja AzIan Shah J (as His Majesty then was) sought to define it as:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

The above illustrates the efforts to balance the delicate balance between the view of allowing a successful litigant the fruits of a successful litigation and the equally valid view that a defendant should be able to have the *status quo* maintained until his appeal, if any, is finally disposed of. If it were that simple, the second view may be fortified by the general principle that a case is not finally disposed of until the right of appeal is exhausted. In an ideal state of course, a defendant would appeal if he has a valid and strong case. But it has to be accepted there may be occasions where an appeal, while arguable, may not necessarily succeed. Then, at the extreme end of the scale, there may be appeals that are completely without basis and may purely be conducted for the purpose of delaying the day of compliance and frustrate the successful litigant. Thus it is provided in r. 13 of the Rules of the Court of Appeal 1994:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

The more recent reported decisions in this country, after *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 are essentially:

24/10/1994

Yun Hing (Sabah) Sdn. Bhd. v. Sandakan Plywood & Veneers Co. Sdn. Bhd. [1995] 1 MLJ 339 HC

3/5/1995

Kerajaan Malaysia v. Jasanusa Sdn. Bhd. [1995] 2 MLJ 105 Supreme Court Civil Appeal 01-20-94.

3/5/1995

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 2 MLJ 119 Federal Court Civil Appeal 01-4-93.

2/8/1995

Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin [1995] 3 MLJ 224 HC

27/11/1995

See *Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* [1995] 3 MLJ 598 CA

12/3/1996

All persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd. [1995] 4 MLJ 533 HC.

As a little diversion it is interesting to note that in the published versions of the judgments of *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* (see [1995] 2 MLJ 105, 110 A; [1995] 2 AMR 1484), the publishers reported a citation to [1993] 3 MLJ 514; [1993] 2 AMR 2095. It would appear from the context, however, that the Supreme Court was quoting from the judgment of YA Ian Chin JC (as he then was) in the High Court in that same *Jasanusa* case. The citation may have wrongly attributed the subsequent passage quoted to [1993] 3 MLJ 514; [1993] 2 AMR 2095 which was the case of *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and another application.* The answer as to the confusion is in the title "and another application" the *Jasanusa Sdn. Bhd.* matter was heard and dealt with together with that of *Datuk Haji Kadir Mohamad Mastan* in the High Court

Be that as it may, the High Court in *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and another application* had summarized the instances of special circumstances: that one of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would

deprive an appellant of the results of the appeal and how pertinent that factor would be may vary according to the circumstances of each particular case (*Mohamed Mustafa v. Kandasami* (No 2) [1979] 2 MLJ 126, 127 FC); that merits of an appeal (*Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116; Yun Hing (*Sabah Sdn. Bhd. v. Sandakan Plywood & Veneers Co. Sdn. Bhd. (supra)*), delay and cause of delay (*Chong Woo Yit v. Government of Malaysia* [1989] 1 MLJ 473), that an order was pursuant to a summary judgment and not a full trial (*Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors.* [1987] 2 MLJ 377), are relevant considerations in the exercise the discretion to grant a stay. The High Court, after quoting the same passage from Leong Poh Shee quoted above then concluded:

> The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the Court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

The Supreme Court in *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* quoted extensively and with approval from the High Court decision, fortifying therefore the view that the special circumstances rule remain applicable, with each case depending on its own facts.

Unfortunately while the passage above eruditely explains why the grant of a stay of execution is kept as a matter of discretion so as to preserve flexibility, the last sentence as an answer begs the original question as to what are the judicial principles to apply to guide the exercise of the discretion, given that the basic principle of "special circumstances" is difficult to define in the first place. Guidance as to the judicial principles in such circumstances can only gathered from reference to previous decided cases.

Nevertheless the adoption of the more liberal approach to "special circumstances" was further fortified in *Government of Malaysia v. Dato' Hj. Ghani Gilong* [1995] 2 MLJ 119 FC:

> We would interpolate, to add, that in another tax appeal, heard at the same sitting at which the instant appeal was heard, we had indeed upheld an order for stay made by the High Court at Tawau, Sarawak, because we are satisfied that the Judge (Ian Chin J) had ample material before him to justify the granting of an order for stay, and there were therefore no grounds for us to interfere with the exercise of his discretion. (see *Government of Malaysia v. Jasanusa Sdn. Bhd.* [1995] 2 MLJ 105.)

However, in the instant appeal, the question arose whether having regard to the particular circumstances of the case, the Judge was entitled to exercise his power to grant a stay.

We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorized agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the Judge could have granted the order for a stay. The *Jasanusa* case, was therefore readily distinguishable, on the facts. We thus had no option but to discharge the order for stay.

The Federal Court in the above case made it clear that an appellant must not only claim special circumstances, but he must also adduce facts by which to show those circumstances. In an application supported by affidavit, the affidavit must adduce facts constituting the special circumstances claimed. The record may also provide the basis (see *Serangoon Garden Estate Ltd. v. Ang Keng*).

The headnote of *Wu Shu Chen* (sole executrix of the estate of *Goh Keng How, deceased v. Raja Zainal Abidin bin Raja Hussin & Anor.* [1995] 3 MLJ 224 provides a relatively clear statement of the law and its application:

(1) It is trite law that an appeal does not operate automatically as a stay of execution. Section 73 of the Courts of Judicature Act 1964 and r. 13 of the Rules of the Court of Appeal 1994 give the Judge a judicial discretion which must be exercised within the confines of the law.

(2) The Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. What may amount to special circumstances is a question of fact in each case. It must be something distinctive and out of the way. An appeal to the Court of Appeal and the fact that a large amount of money is involved do (*sic*) not constitute special circumstances.

(3) The applicant had failed to establish by affidavit evidence that the first defendant was insolvent and therefore would not be in a position to reimburse the award and to pay damages in the event that the applicant were to succeed in her appeal.

In All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the *Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd.* [1996] 4 MLJ 533 (hereinafter referred to as *Punca Klasik Sdn. Bhd.*) the High Court, in somewhat vigorous terms, dealt with the apparent divergence between the Supreme Court and the Federal Court decisions on the one hand and that of the Court of Appeal in *See Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* on the other, and concluded that based on the principle of *stare*

decisis, it would follow the Federal Court case. The apparent divergence seems to be the selection of the approach to be used: special (or exceptional) circumstances versus the nugatory test.

With respect, the principle of stare decisis may provide a quick answer in the event there is a conflict as to the *ratio decidendi*. But first the exercise to review the conflicts if any is in itself instructive. *Serangoon Garden Estate Ltd. v. Ang Keng* referred to "special circumstances" as an established principle:

> But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can shew special circumstances to justify it.

However, in that case the only ground that was advanced was that if the defendant succeeded in his appeal he could not be restored to the same position as before because the plaintiffs would have removed his pig-sty. It was held that ground, standing alone, cannot be a sufficient ground on which to grant a stay of executions although it may well be an important factor to be taken into consideration if there were other grounds. Interestingly the term "nugatory" was not used. To that extent the case has been overruled by the more recent case of *Mohamed Mustafa v. Kandasami* (No 2) [1979] 2 MLJ 126 FC:

> ... One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.
>
> In the instant case, it is the considered judgment of this Court that the respondent ought to be granted stay of execution to maintain the status quo so as not to deprive him, if successful, the result of his appeal.

Thus it was established beyond question in this country after 1979, that the fact an appeal would, if successful, be rendered nugatory may, depending on the circumstances of each particular case, by itself become a sufficient reason to grant a stay of execution. To that extent the statement in see *Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* is entirely correct:

> For my part, having considered the more recent authorities on the subject, I have come to the conclusion that decision is bad law, and ought no longer to be followed by this Court.

Punca Klasik Sdn. Bhd. suggested that the Court of Appeal in see *Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* rejected the special or exceptional circumstances approach in favour of a nugatory test approach:

> ... My attention was drawn to the recent Court of Appeal case of see *Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* [1995] 3 MLJ 598 (CA), where it was held that the Court before which a stay of execution or a stay of

> proceedings was filed no longer needs to examine whether there were special circumstances in existence but rather must consider whether unless the stay was granted the appeal, if successful, would be rendered nugatory the nugatory approach') ... ([1996] 4 MLJ @ 539 1-540 A)

However, see *Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* had concluded:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s 44(1) of the Courts of Judicature Act 1964, is that the appeal to this Court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this Court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.
>
> But cases may arise where, in determining the critical question whether an appeal would be rendered nugatory, this Court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable. In such cases it would not, as I perceive the law, be a proper exercise of discretion for this Court to shut its eyes to the practical realities of the situation, and to nevertheless proceed to grant a stay.

The Court of Appeal had followed *Mohamed Mustafa v. Kandasami* (No 2) but upgraded the nugatory rule from "one of the determining factors" the weight of which may vary from case to case, to the status of "the paramount consideration", but certainly did not do away with the special or exceptional circumstances rule.

The Australian courts too have wrestled with the special or exceptional circumstances approach. Thus Mahoney JA in *Re Middle Harbour Investments Ltd. (In Liquidation)* (Court of Appeal unreported 15 December 1976) sought to avoid the special or exceptional circumstances term by a requirement to "demonstrate an appropriate case":

> Where an application is made for a stay of proceedings, it is necessary that the applicant demonstrate an appropriate case. *Prima facie*, a successful party is entitled to the benefit of the judgment obtained by him and is entitled to commence with the presumption that the judgment is correct. These are not matters of rigid principle and a Court asked to grant a stay will consider each case upon its merits, but where an applicant for a stay has not demonstrated an appropriate case but has left the situation in the state of speculation or of mere argument, weight must be given to the fact that the judgment below has been in favour of the other party.

This approach compares with that of the High Court in *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and another application*, and approved of by the Supreme Court in *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.*, which took the view that the categories should remain open. Kirby P in *Alexander v. Cambridge Credit Corp Ltd.* [1985] 10 A CLR 42 CA (NSW), said:

> Although it is true that, in a number of more recent decisions of the Court, reference has been made to the requirement of 'exceptional' and 'special' circumstances, and although the same requirement appears still to be observed in Victoria, the general practice of the Court conforms more closely to that stated by Mahoney JA. In our opinion, it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour.

It ought to be noted Kirby P, having said the above added there are principles to be kept in mind, such as: that the onus is on the applicant to show a proper basis for the stay that is fair to all parties; the balance of convenience and the competing rights of the parties; likelihood of dissipation of the assets; that an appeal would if successful be rendered nugatory is an substantial factor; and merits of the appeal. To summarize, Kirby P decided that it is not necessary to show special or exceptional circumstances, but only an "appropriate case"; and there are various factors that could be taken into account, including that an appeal if successful would be rendered nugatory as a factor.

In other words, Kirby P would drop the special or exceptional circumstances terminology, replace it with "demonstrate a reason or an appropriate case to warrant the exercise of the discretion in his favour" and keep the various factors that can be considered open.

The term "demonstrate a reason or an appropriate case" may well be clearer than "show special or exceptional circumstances". Nevertheless the Supreme Court in *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* has maintained the special or exceptional circumstances terminology while keeping open its categories of factors to be considered, with each case to be looked at on its merits. In other words, the Court should consider all relevant factors or circumstances.

It is clear therefore, apart from choice of terminology or words, the approaches in *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* and *See Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors.* are very similar and flexible. Thus if an applicant is able to demonstrate that an appeal if successful would be rendered nugatory if a stay is not granted, that would be a determining or paramount factor in that a stay will normally be granted. Short of that, the next question is whether it is possible to put the parties back to the pre-existing

status quo without undue inconvenience or hardship if an appeal by the defendant is successful. Indeed the Court must look to the practical realities of a situation to weigh the balance of convenience. A stay order is akin in effect to an injunction preventing the successful party from proceeding with execution of that judgment, and the general principle of balance of convenience should apply.

Also it is generally assumed that normally no stay will be given for an order for the payment of sum of money, where an undertaking to refund the payment may be a sufficient answer. The size of the payment relative to the size of the parties may well be a factor: if a payment is substantially all of the assets of the appellant a stay should be considered favourably. A stay may well be considered if the sum is very large and would necessitate the disposal of assets to comply with the order since the exercise may entail losses that could not be reversed later. It has been held that the likelihood of the dissipation of the asset by the applicant is a good reason not to order a stay. On the other hand, a stay ought to be granted if the plaintiff is a gambler or a wastrel and therefore likely to dissipate payment released to him, offering little hope of recovery in the event the appeal is successful. This amply shows why it is necessary to look closely at the facts of each case to assess the merits of the application; and to ensure the order is fair to both parties, a stay order need not be made simpliciter but may be made on terms.

Inherent in the cases above is that it is incumbent upon the applicant to demonstrate the existence of special circumstances for a stay. It is not enough to claim special circumstances and rely on submissions, unless of course, the circumstances and factors relied upon are apparent from the record. Otherwise he must set forth the circumstances and factors that he relies on in an affidavit. A well drafted application and affidavit would put forward a proposal with alternatives, in case a stay order simpliciter is not granted, that would fairly balance between the interests of a successful plaintiff and an applicant who has filed an appeal.

Thus to summarise, an applicant for a stay must:

a. In his application pray for the specific order required, with alternatives to a stay simpliciter if applicable.

b. In his supporting affidavit:

   i) aver there are special or exceptional circumstances.

   ii) aver the particular factors or circumstances relied on as special or exceptional circumstances.

   iii) aver and prove (with exhibits where necessary) the facts relied on as supporting the factors or circumstances at (ii) above, if these facts are not clear or apparent in the record.

The factors and supporting facts advanced for this Application.

During submission the first factor submitted upon is the merit of the appeal. The next argument put forward is that the applicant is running the business of a restaurant. It was submitted the business will be adversely affected without likelihood of remedy if a stay of the writ of execution is not granted and the applicant succeeds in his appeal. It was also submitted there were other stalls operators who had rented space in the restaurant and their livelihood would also be affected and that they were not named in the writ of possession.

Considering the grounds for the decision, this Court is of the view there is little merit in the appeal. Service to the defendant had been served at the premises of the restaurant. The defendant had not appealed or sought a stay. The applicant alleges he had bought the business from the defendant, yet no evidence was advanced to support the claim. There is no supporting affidavit from the defendant who is deafeningly silent in the circumstances. It is inconceivable that a person who acquires a business on rented premises not to notify the landlord, to require that the landlord be notified or inquire into the remaining term of the tenancy from the landlord.

In his supporting affidavit, nowhere is it alleged he or the defendant has sought to renew or extend the tenancy, which had expired. The emergence at this late stage, of a claim that there are other stalls operators on the premises in the supporting affidavit filed (Encl. 28 para 8), does not add to credibility of the application since no mention was made of such operators in the application to set aside the writ of possession which was rejected by this Court. Nowhere in the affidavit is it averred that there is any tenancy between the landlord and the applicant or that he is paying rent. The applicants' business on the premises is therefore one that has overstayed its due term. Further there is no averment as to the actual income derived by the applicant from the premises to show what damage if any would be suffered. There could be no real loss to the applicant since had he moved out at the end of the term of the tenancy, he would not be deriving income from the premises. Any "loss" if awarded would amount to rewarding the applicant for hanging on to the premises. Indeed in his affidavit (see para 8) he says he needs time to find alternative premises and in submissions Counsel advised the Court a period of one month is required.

Indeed the sole averments in the affidavit are merely as to general claims of hardship to his family, existence of other stall operators, that losses to him cannot be compensated, needing time to find alternative premises, that his appeal if successful would be nugatory, belief that his appeal has merit, and that plaintiff has not given any reason for his actions. Apart as to argument relating to merit, there is no substance or evidence advanced to support or shows what losses he would incur and why he says it cannot be compensated. As to merit, since his case lies entirely on technical procedural compliance, it

is noted the result, if he were successful, would be the application for and issuance of a fresh writ of possession. Thus it is merely a matter of time. Having stated he needs one month to find alternative premises if he were to move out, there is nothing in the circumstances of this case that can be said to become nugatory if he is given that time. As to the plaintiff justifying his action, all that needs be said is that the plaintiff not being disputed as the owner of the premises, having obtained judgment for possession and in the absence of any proceeding to set aside the judgment, need not show any reason for following up with execution proceedings. The existence of other stall operators, if true, is by itself, irrelevant to the applicant's case as it is for them to seek their own remedy.

For the reasons given above, the application for stay of execution pending disposal of appeal was rejected with costs; the date of execution of the writ of possession being postponed to 25 August 1996 to enable him to find alternative premises.

Reported by W.A. Sharif